STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of EDWARD VACEK, Deceased.

MONROE BANK AND TRUST, Personal Representative of the Estate of EDWARD VACEK and MARY ANN FRYSINGER,

Petitioners-Appellees,

v

ROBERT E. BUTCHER,

Respondent-Appellant,

and

VJERA VACEK,

Respondent.

UNPUBLISHED
July 14, 2005

No. 253150
Monroe Probate Court
LC No. 00-000251-DE

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Respondent, Robert E. Butcher, appeals as of right a trial court order for complete estate settlement. Because the trial court properly found that Vjera Vacek ("Vjera"), the decedent's subsequent spouse, had a right of election against property covered by a joint and mutual will executed by the decedent and a former spouse, and because none of respondent's remaining issues on appeal are preserved for our review, we affirm.

This Court lacks jurisdiction for four of respondent's issues on appeal. An interested person aggrieved by an order of the probate court may appeal as of right certain enumerated orders. MCR 5.801(B)(1). Among those enumerated orders are orders allowing or disallowing an account, fees, or administration expenses. MCR 5.801(B)(1)(g). Respondent was removed as personal representative of the decedent's estate and ordered to file an interim accounting. Respondent filed the accounting; however, the trial court denied respondent's interim account. The trial court ordered respondent to surrender cash on hand, $19,859.98, to petitioner Monroe Bank and Trust (Bank). Respondent did not surrender the cash on hand. The trial court found respondent in contempt of court. At the contempt proceedings, respondent tendered $1,425 to

petitioner Bank. On March, 12, 2002, the trial court denied petitioner Bank's request to incarcerate respondent and entered a judgment in favor of the estate for $17,159.98.

Respondent filed a claim of appeal with this Court from the trial court's March 12, 2002, contempt order and judgment. On May 3, 2002, this Court entered an order dismissing respondent's claim of appeal. This Court held that the judgment stemming from the civil contempt order and judgment does not fall within the category of appealable probate court orders and held that the Court lacked jurisdiction. *In re Estate of Vacek,* unpublished order of the Court of Appeals, entered May 3, 2002 (Docket No. 240637). On May 20, 2002, respondent filed a motion for reconsideration with this Court (Docket No. 240637, event 10). On July 17, 2002, this Court denied respondent's motion for reconsideration. *In re Estate of Vacek,* unpublished order of the Court of Appeals, entered July 17, 2002 (Docket No. 240637). The trial court entered an order for complete estate settlement on December 17, 2003.

Respondent's first issue on appeal is that the March 12, 2002, trial court judgment entered against respondent is void. However, this issue is not properly before this Court. Although respondent may be an interested person aggrieved by the complete estate settlement order, this issue raised on appeal involves an order previously ruled on by this Court. An interested person aggrieved by an order of the probate court may appeal as of right certain enumerated orders. MCR 5.801(B)(1). Among those enumerated orders are orders allowing or disallowing an account, fees, or administration expenses. MCR 5.801(B)(1)(g). In addition, an appeal by right in a civil action must be taken: (1) within twenty-one days after entry of the judgment or the order appealed; (2) within twenty-one days after the entry of an order denying a motion for new trial, rehearing, reconsideration or other post judgment relief, if the motion was filed within the initial twenty-one day appeal period or within further time the trial court may have allowed during that twenty-one day period; or (3) within another time provided by law. MCR 7.204(A)(1); *Baitinger v Brisson*, 230 Mich App 112, 115; 583 NW2d 481 (1998).

Respondent previously appealed the March 12, 2002, contempt order and judgment. As this Court previously held, respondent failed to appeal the trial court's order rejecting his proposed final account. This Court entered the order dismissing respondent's appeal based on lack of jurisdiction on May 3, 2002. *In re Estate of Vacek,* unpublished order of the Court of Appeals, entered May 3, 2002 (Docket No. 240637). On May 20, 2002, respondent filed a motion for reconsideration with this Court (Docket No. 240637, event 10). On July 17, 2002, this Court denied respondent's motion for reconsideration. *In re Estate of Vacek,* unpublished order of the Court of Appeals, entered July 17, 2002 (Docket No. 240637). Respondent failed to appeal the correct order (i.e., the trial court order disallowing his account) within twenty-one days of this Court's denial of his motion for reconsideration, as prescribed in MCR 7.204(A)(1). Therefore, this issue is not properly before this Court.

Respondent further contends that the trial court erred in finding that the money petitioner Frysinger advanced respondent to secure the solvency of the estate was part of the estate's assets. However, this issue also deals with the trial court's order disallowing respondent's accounting. Respondent has failed to timely appeal the trial court's order rejecting his final accounting. Therefore, this issue is not properly before this Court. Respondent further contends that the trial court denied him of his due process when it took his property without conducting a hearing. This issue also deals with the trial court's order rejecting respondent's proposed final accounting, from which respondent failed to file a timely claim of appeal. Therefore, this issue is not

properly before this court. Likewise, respondent's claim to an entitlement of a lien against funds advanced by petitioner Frysinger should have been raised on appeal from the trial court's order denying his final accounting.

Respondent further contends that the decedent's subsequent spouse does not have a right of election against property covered by a joint and mutual will. Respondent failed to properly preserve this issue because it was not raised and addressed by the trial court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). In the absence of an objection, an issue is reviewed for plain error on appeal. To obtain relief, the error must have occurred, it must have been obvious, and it must have affected substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

MCR 5.125(C)(8) provides that persons interested in a petition for an order of complete estate settlement are: (1) devisees of a testate estate, (2) heirs unless there has been an adjudication that decedent died testate, (3) claimants and (4) such other persons whose interests are affected by the relief requested. MCR 5.125(C)(8). In addition, an interested person aggrieved by an order of the probate court may appeal as of right certain enumerated orders. MCR 5.801(B)(1). Among those enumerated orders are orders assigning any of the assets of an estate. MCR 5.801(B)(1)(g).

Here, the fiduciary account submitted with the petition for complete estate settlement provided that the judgment entered against respondent was an asset of the decedent's estate. The judgment against respondent was assigned to petitioner Frysinger and Vjera proportionally. Therefore, respondent's interests were affected by petitioners' requested relief and respondent is an interested person aggrieved by the complete estate settlement order. However, respondent's contention regarding the decedent's elective share is without merit.

The decedent and his former spouse, Margaret, executed a joint will. Petitioner Frysinger received a residuary interest in the estate. Margaret died in 1988. After Margaret's death, the decedent married Vjera. The decedent died in April 2000. Respondent was appointed personal representative of the estate and was subsequently removed as personal representative. The trial court directed respondent to surrender the estate's cash balance on hand. Respondent failed to do so and was found in contempt. The trial court entered a judgment in favor of the estate for $17,159.98. Vjera filed an election to take half of the share that would have passed to her had the decedent died intestate, reduced by one half of the value of all property derived from the decedent by any means other than testate or intestate succession upon the decedent's death. The trial court's order for complete estate settlement included an assignment of a portion (approximately sixty-five percent) of the judgment against respondent to Vjera.

Respondent now contends that Vjera did not have the right of election against property covered by the joint will executed by the decedent and Margaret. Specifically, respondent contends that MCL 700.2301 provides that the statutory share of a surviving spouse is not applicable to joint and mutual wills. MCL 700.2301 provides, in its pertinent part, that "a testator's surviving spouse [who] marries the testator after the testator executes his or her will . . . is entitled to receive an intestate share, not less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate as to that portion of the testator's estate." However, respondent's contention is unfounded. It appears from the record that Vjera decided to take an elective share of the decedent's estate pursuant to MCL 700.2202.

Upon an individual's death, that individual's surviving spouse has a right to an elective share of the estate of the deceased. MCL 700.2201. The surviving spouse of a decedent who dies testate may elect to either (1) abide by the terms of the will, or (2) take one-half of the sum or share that would have passed to the surviving spouse if the decedent had died intestate, reduced by one-half of the value of all property derived by the spouse from the decedent by any means other than testate or intestate succession upon the decedent's death. MCL 700.2202(2); *In re Estate of Eggleston*, 266 Mich App 105, ___; ___ NW2d ___ (2005). The surviving spouse must elect an option within sixty-three days after the date for the presentment of claims, or within sixty-three days after filing proof of service of the inventory upon the surviving spouse. MCL 700.2202(3). A surviving spouse who fails to make an election within this specified time the surviving spouse is conclusively presumed to have elected to abide by the terms of the will. MCL 700.2203.

Respondent contends that Vjera was provided proof of service of inventory on February 12, 2001. Vjera filed her notice to take an elective share on April 20, 2001. Were we to accept respondent's contention, Vjera's notice to take an elective share would not have been within the sixty-three day period prescribed in the statute. However, the record indicates that respondent was removed as personal representative of the estate on February 9, 2001 (i.e., before he provided Vjera with proof of service of inventory). Petitioner Bank subsequently provided proof of service of inventory on April 16, 2001. It is clear from the record that Vjera filed her elective share notice on April 20, 2001, some four days after the proof of service of inventory was sent by petitioner Bank. Plainly, Vjera filed her elective share notice within the statutorily prescribed period and respondent's contention is without merit. Nothing in the record indicates that Vjera waived her rights to share in the decedent's estate, pursuant to MCL 700.2205. The trial court did not commit plain error when it determined that Vjera had a right to an elective share of the decedent's estate.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat M. Donofrio